Supreme Court, U.S.
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No. _____

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1996

Richard B. Kiepfer, *Petitioner,*

v.

United States of America, *Respondent*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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64 pp

QUESTIONS PRESENTED

Whether the obtaining of consent to search of medical records by the representation the search was routine (as conceded by the government agent) invalidated such search which was for the purpose of targeting petitioner for criminal prosecution (also conceded by the government agent.)

Whether the petitioner was denied due process of law, by denial of the equal opportunity to be heard by the filing of a government proposed remand order in the District Court without service on petitioners' attorney of record, qualified to practice in said court, while case was pending in Appellate court, resulting in adverse District Court order, sustaining its prior opinion with only the government's position, set forth in detail, in the proposed order being before such court.

Whether Petitioner as a physician, was exempted by 21 U.S.C. §827 (c) from the record keeping requirements as there was no charge to patients for drugs except for a few charges to Petitioners wife apparently for tax purposes.

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA

Plaintiff - Respondent

v.

RICHARD KIEPFER, M.D.

Defendant - Petitioner

Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The first opinion of the Court of Appeals (App. Infra 4-9) is unreported and resulted in remand for reconsideration. Appeal after remand was dismissed as being without substance after filing of briefs (App. 1-3). The ***Opinions*** of the District Court (App. 13-26 and 10-12) are unreported.

JURISDICTION

The Court of Appeals entered its judgement on March 7, 1997 (App. 1). The Jurisdiction of the Court is invoked under 28 USC §1254 (2).

LEGAL PROVISIONS INVOLVED

The fifth amendment to the US Constitution provides: No person shall...be deprived of life, liberty or property, without due process of law....

21 U.S.C §827 (c)provides the foregoing provisions for this section shall not apply...

> (B) to the administring of controlled substances...unless a practitioner regularly engages in the dispensing... and charges his patients either separately or together with charges for other professional services for substances so dispensed.....

21 C.F.R. §1316.08(a), based on 21 U.S.C. §880, provides An....warrant shall not be required if informed consent is obtained.....

STATEMENT OF THE CASE

Respondent by complaint in U.S. District Court alleged petitioner had failed to keep or make accessible, medical drug records required by 28 USC §827. Jurisdiction was based on 28 USC §827, §842, and §1345 (App. 35). The Court found in favor of

complainant and fined petitioner $152,000 (App. 32). The Fifth Circuit then remanded for further consideration of the adequacy of the drug records, but ruled against petitioner on his unconstitutional search and exemption from record keeping issues (App 4-9). Immediately after the ruling, before rehearing, *en banc* consideration was requested the respondent filed a proposed remand order, and exhibits in the District Court and served only the undersigned appellate attorney, who was not a member of the Texas bar, and was not qualified to practice in the court. Respondent failed to serve the attorneys of record in the district court (App. 27-32).With only the governments remand order before it, the District Court issued a new order finding that some information, found lacking in its first order was in fact available, but that the remaining deficiencies justified the fine initially imposed and appropriately sent the order to the petitioners attorney of record, ***John Mastin,*** without transmittal to the undersigned appellate attorney (App 27-32). On appeal, the 5th Circuit Court after filing of briefs dismissed the appeal for lack of merit, finding that the search question and other issues raised before remand could not be revisited and petitioner was properly served (App.1-5).

REASONS FOR GRANTING PETITION

As will be shown in the argument, the search question directly conflicts with opinions of this court, which hold that consent to a search obtained by Government Fraud is invalid. The question is of such weight that it supports collateral attack so the right to argue it should continue. It would have been inappropriate to impose on this court by seeking certiorari of the first appellate ruling which had favored petitioner with directions that trial court reconsider the evidence and which might have resulted in Petitioner's exoneration without consumption of the time of the Supreme Court. The argument indicates the factors that show congress exempted physicians from time consuming medical drug records requirements unless the practioner customarily charged patients directly for the drugs. If this court finds the congressional intent was to exempt physicians, the physicians who are given misdirection by the ruling below that they are not

exempt can practice in the manner intended without the burden of record keeping. As shown in the argument this court has ruled that due process requires the Governed to have equal opportunity with the Governing to be heard. The respondents action of filing in the District Court the proposed order while the case was pending before the Appellate court, without service on attorney of record in the District Court deprived petitioner of an opportunity to be heard.

Granting will develop the factors indicating that targeting was to prevent expert testimony in favor of malpractice victims. Thus in 1991, Dr. Kiepfer received an award of several million dollars against certain physicians and an insurance company because they conspired to fire him, and cancel his malpractice insurance essential to practice to prevent his testifying in favor of patients suing doctors. Kiepfer v Beller *944 F 2nd 1213 (5th Cir. 1991).* At the time of such litigation, petitioner was investigated in the Boerne district by a DEA agent from the distant Houston District who was the son of a doctor whom petitioner was scheduled to testify against (App 51-52). The initial Judge assigned to the case sua sponte recused himself stating he was a patient of Dr. Beller who was soliciting federal agencies proceed against Dr. Kiepfer(App.33-34). This record's government attorney opposed petitioner in suits against government(App 54, 55).The medical institution undertook by intimidation to deprive the legal institution of that medical expert witness testimony essential to a fair resolution of malpractice issues.

THE CONSENT TO SEARCH WAS INVALID UNDER THE OPINIONS OF THIS COURT

This court in the cases of Gouled v. US 255 US 298 (1921), and Lewis v. US 385 US 206 (1966) stated that consent for search obtained by deception was invalid. The case of SEC. v E.M.S. Government Securities Inc. *645 F 2d 310 (5th Cir. 1981)* involved the Securities Exchange Commission misinforming a private company that they wished permission to make a routine search when the search was not routine, but was for investigation purposes (App 42-46 & 53). The court held that a private person must be able to rely on the agents of his government and

invalidated the search. Dr. Kiepfer's assistant who signed consent was told by the Government Agent that the search was routine, and conveyed such message to Doctor Kiepfer (App 42-47 & 53). The Government Agent admitted at trial that Doctor Kiepfer was targeted (App. 45). Justice Holmes stated in Olmstead v. U.S., 277 US 469, 72 L.Ed 753 ....I think it is a less evil that some criminals should escape than that the government should play an ignoble part.....no distinction can be taken between the government as prosecutor and the government as judge.

THE ENTRY OF THE REMAND ORDER ON A RECORD THAT HAD, AS A RESULT OF RESPONDENT'S OMISSION AND ACTION ONLY THE GOVERNMENT'S POSITION, VIOLATED THE OPINIONS OF THIS COURT HOLDING THAT DUE PROCESS REQUIRES EQUAL OPPORTUNITY TO BE HEARD

In the case of Degen v. U.S. *517 US ___, 116 S.Ct. 1775,* 135 LEd 2nd 102 (1996) the court set aside a forfeiture because the citizen was not afforded a right to be heard. Richards v Jefferson County, 517 US____, 116 S. Ct. 1761, *135 L Ed 2nd 76 (1996)* held a citizen unbound by a ruling in a case that the failure to give notice as to hold him bound would violate his due process right to be heard. The respondent submitted a proposed order *(App 30)* that detailed the position of government supported by evidence in the nature of exhibits.

The Government, having transmitted to the court its proposed order with exhibits, which order set forth in detail the justification for supporting the government, effectively had its position fully heard on remand. The government's action in submitting the order immediately and prior to request for rehearing and consideration en banc (denied) without service on the attorney of record combined with appellate attorney's failure to realize he was the only person served and failing to draw attention to responder's error deprived petitioner of the due process right to be heard, which could have been easily corrected by a second remand.

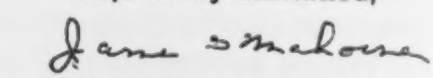
PETITIONER WAS EXEMPT FROM RECORD KEEPING REQUIREMENT

As stated in 1984 U.S. Code Cong. And Adm. News, Legislative history, page 3451Sect. 512 to 513 of Pub L. 9843, Practitioners are exempt from controlled substance record keeping for prescribing "in the lawful course of their professional practice", and for administering "unless the practitioner regularly engages in the dispensing or administering of controlled substances and charges his patients .... for substances so administered." The 5th Circuit held in U.S. v. Clinical Leasing Services Inc. *925 F 2d 12 (1991)* that every charge of the patient for services included a charge for any drugs administered. Clearly the 5th Circuit interpretation, which was impliedly implied to petitioner nullifies the exemption as all patients are charged for services. The interpretation defeats the intent of Congress to reduce medical costs by only requiring record keeping for physicians in the commercial drug practice who charge patients a specific price for the drug. The 5th circuits interpretation results in the expense of record keeping, contrary to the intent of Congress, occurring throughout the territory of the 5th circuit. As found by the 5th circuit opinion and the initial District Court the only drug charge made by Doctor Kiepfer as shown by full review of all his records was a few charge to his wife (probably for tax purposes).(App 49-50)

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

RICHARD B. KIEPFER, *PETITIONER,*

V.

UNITED STATES OF AMERICA, *RESPONDENT*

APPENDIX TO THE
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-50646
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RICHARD KIEPFER, M.D.,

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas
(SA-92-CV-3571

(March 7, 1997)

Before WISDOM, KING, and SMITH, Circuit Judges.

PER CURIAM:*

In this appeal, Kiepfer contends that (1) the consent to search was obtained by fraud; (2) the Government's submitting of a proposed amended order on remand and his purported inability to respond violated his due process; and (3) remand "should be [for] a broad hearing on the issues approximating a de novo hearing."

Consent to search

The scope of our review on appeal following remand is limited. The only issue for consideration is "whether the court

below reached its final decree in due pursuance of our previous opinion and mandate."[1] Because Kiepfer failed to amend his notice of appeal following the district court's denial of his Rule 59(e) motion, this court has jurisdiction over only the issues raised by the district court's order on remand and not over any of the issues arising from the denial of Kiepfer's Rule 59(e) motion.[2]

Kiepfer's argument that the consent to search was obtained by fraud, having been raised in his Rule 59(e) motion, as well as in his first appeal, is not subject to review by this court.[3]

* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

Due Process

On appeal, Kiepfer contends for the first time that the Government's submitting of a proposed amended order when he was unable to respond violated his due process rights, thereby invalidating the order on remand. This argument is totally without merit. Dr. Kiepfer was properly served with the proposed amended order, and the district court was free to adopt the proposed findings.[4]

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1 Burroughs v. FFP Operating Partners, L.P., 70 F.3d 31, 33 (5th Cir. 1995).

2 Fed. R. App. P. 4(a)(2), (a)(4)(C), Reeves v. Collins, 27 F.3d 174, 177 (5th Cir. 19940

3 See Reeves, 27 F.3d at 177, Burroughs, 70 F.3d at 33.

4 Studiengeselllschaft Kohle v. Eastman Kodak Co., 616 F.2d 1315, 1323 (5th Cir.) cert. denied 449 U.S. 1014 (1980).

Scope of review on remand

Kiepfer argues that if the case is remanded again, "remand should provide for a broad relatively unlimited hearing of a de novo nature." Because the appeal is dismissed as frivolous, this issue is moot.

Order on remand

Fed. R. App. P. 28(a)(4) requires that the argument on appeal contain the "contentions of the appellant on the issues presented, and the reason therefor, with citations to the authorities, statutes, and parts of the record relied on." Issues not adequately argued in the body of the brief are deemed abandoned on appeal.[5]

In this appeal Kiepfer does not assign any specific error to the district court's order on remand, does not cite to the record, and does not cite any authority in support of his position. He concludes merely that the "computer records and defendant's evidence...show that many of the deficiencies sustained against [him] were sustained in error." Because Kiepfer does not present any intelligible arguments regarding the district court's order on remand, his argument is deemed abandoned. This appeal, being entirely without merit, is dismissed.[6]

APPEAL DISMISSED.

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[5] L & A Contracting v. S. Concrete Servs., 17 F.3d 106 (5th Cir. 1994).

[6] 5th Cir. R. 42.2

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 95-50220
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RICHARD KIEPFER, M.D.,

Defendant-Appellant.

Appeal from the United States District Court for
the Western District of Texas

(SA-92 CA 357)
(November 30, 1995)

Before REAVLEY, SMITH and PARKER, Circuit Judges.

PER CURIAM:*******

******* Local rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Dr. Kiepfer appeals a judgment assessing civil penalties for violations of the Comprehensive Drug Abuse Prevention and Control Act. 21 U.S.C. § 801, et seq. Dr. Kiepfer is a registrant licensed to dispense certain controlled substances. 21 U.S.C. § 823 (b & e); 21 C.F.R. § 1304.03. One of the many requirements of being a registrant is that Dr. Kiepfer must "maintain, on a current basis, a complete and accurate record of each such substance manufactured, received, sold, delivered, or otherwise disposed of by him . . ." 21 U.S.C. § 827 (a) (3). Dr. Kiepfer's grounds for appeal are based upon government misconduct, a statutory exemption to the reporting requirement, and the district court's errors in law or fact. We remand for reconsideration and further findings.

On October 24, 1991 the Drug Enforcement Agency and the Texas Department of Public Safety conducted a joint audit of Dr. Kiepfer's records to determine his compliance with federal and state reporting requirements. See 21 U.S.C. § 827 (a) (3); 21 C.F.R. § 1304.03. At the request of the inspectors, the office manager produced Dr. Kiepfer's records. The office manager and a second employee both testified that the agent and the officer were informed that Dr. Kiepfer also maintained computer records but that the agent and the officer said they already had all the information needed. The agent and the officer denied this exchange occurred. The computer records were submitted by Dr. Kiepfer's attorney three months later. The parties dispute whether these computer records were "readily retrievable" within the meaning of the statute. See 21 U.S.C. § 827(b).

Without deciding whether the computer records were "readily retrievable," the district court found that both sets of records, together, were deficient and did not comply with the statute. The district court found that Dr. Kiepfer failed on seventy-five instances to maintain proper records and also found that he improperly stored a controlled substance in an unregistered location. He was fined $2,000.00 per violation, or a total of $152,000.00, for all seventy-six counts. Dr. Kiepfer appeals. The trial court's findings of fact will not be reversed unless clearly erroneous, and the legal issues are reviewed de novo. Switzer v. Wal-Mart Stores, Inc., 52F.3d 1294, 1298 (5th Cir. 1995).

Dr. Kiepfer asserts that the government inspection and later prosecution were in retaliation for his appearances as an expert witness against the government and other private physicians. The DEA agent testified that the inspection was conducted by government agents subsequent to information from Dr. Kiepfer's drug supplier that his orders of certain controlled substances substantially exceeded other physicians in the region. Dr. Kiepfer's claim that the inspection was a result of governmental retaliation is not supported by the record.

Next Dr. Kiepfer asserts that the consent to inspect given by his office manager was obtained through fraud. See 21 U.S.C. § 880(c) (1) (an administrative inspection warrant is not required where owner or agent consents to inspection). The mere failure of the DEA agent to warn the office manager that the investigation may result in criminal or civil charges is not fraud. See United States v. Knight, 898 F.2d 436, 438 (5th Cir. 1990) (failure of IRS agent to inform taxpayer that the investigation may result in criminal charges is not fraud).[1] Dr. Kiepfer has shown no error.

Dr. Kiepfer argues that the joint operation by state and federal authorities violated the constitutional prohibition against double jeopardy. Apparently, Dr. Kiepfer was convicted in a state criminal trial for violations of the state recordkeeping statute, sentenced to imprisonment and ordered to pay a fine and restitution. He asserts that this subsequent federal civil action is barred by double jeopardy.

Even if this civil action were a "criminal procedure" for purposes of the double jeopardy clause, there would be no violation. "There is no double jeopardy prohibition against an individual being prosecuted by dual sovereigns." United States v. McKinney, 53 F.3d 664, 676 (5th Cir. 1995). There may be an

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[1] Dr. Kiepfer also asserts that his trial counsel was deficient for failing to make this argument during the trial. His argument is basically an ineffective assistance of counsel argument which does not apply in a civil case. Sanchez v. United States Postal Serv., 785 F.2d 1236, 1237 (5th Cir. 1986).

exception to this rule where prosecution by one sovereign is used as a tool for successive prosecution by the other. Bartkus v. Illinois, 359 U.S. 121, 123-134, 79 S.Ct. 676, 677-78 (1959); McKinney, 53 F.3d at 676. However, to avail himself of this exception Dr. Kiepfer has the burden to show a prima facie double jeopardy claim. McKinney, 53 F.3d at 676. Dr. Kiepfer made no such showing.

In one short sentence citing Austin v. United States, 113 S.Ct. 2801 (1989) and referencing us to his argument above, Dr. Kiepfer argues that the second "conviction" also violates the constitutional prohibition against excessive punishment or fines. Dr. Kiepfer's brief is wholly bereft of argument; therefore, we consider his argument abandoned for being inadequately briefed. L & A Contracting Co. V. Southern Concrete Servs., Inc., 17 F.3d 106, 113 (5th Cir. 1994); Fed.R.App.P. 28(a) (5), (6).

Dr. Kiepfer also argues that he is exempt from the record keeping requirements because there was no showing that he regularly charged his clients. See 21 U.S.C. § 827 (c). The district court was not clearly erroneous in finding that the preponderance of the evidence indicated that the "nonapplicability" portion of the statute did not apply in this instance.

Dr. Kiepfer was required to maintain specific records of the receiving and dispensing of controlled substances.[2] As a

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[2] Dr. Kiepfer was required to maintain records with the following information:

(a). The name of the substance;

(b). Each finished form (e.g., 10-milligram tablet or 10-milligram concentration per fluid once or milliliter) and the number of units or volume of fininshed form in each commercial container (e.g., 100-tablet bottle or 3-milliliter vial);

(c). The number of commercial containers of each such finished form received from other persons, including the date of and number of containers in each receipt and the name, address, and registration number of the person

registrant, he is held strictly accountable for failure to properly maintain these records. United States v. Green Drugs, 905 F.2d 694 (3rd Cir.), cert. denied, 111 S.Ct. 518 (1990).

The district court apparently examined both the computer records and the records retrieved by the DEA agent during the inspection. Dist. Ct. Order p. 8 and p. 9, n. 2. The district court determined that "whether the [computer] records were readily retrievable need not be considered." Dist. Ct. Order p. 8. The order specifically focused on the dates the controlled substances were ordered, received and dispensed. Our examination of the computer records indicates that by matching the drug enforcement agency form number on the two sets of records, we are able to determine the missing dates. For example, concerning count four the district court notes that the records do not list the date dispensed for dilaudid, a schedule II drug controlled substance. The dilaudid in count four was ordered on July 21, 1991 and received on August 6, 991. By examining the DEA form number (910217473) listed on the records received by the DEA agent during the inspection and examining the same DEA number on the computer generated list, we can determine that the dilaudid was dispensed on August 15, 1991.

Therefore, the district court was inaccurate in its findings of fact. We remand the case for further determinations or

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from whom the containers were received;

(d). The number of units or volume of such finished form dispensed, including the name and address of the person to whom it was dispensed, the date of dispensing, the number of units or volume dispensed, and the written or type written name or initials of the individual who dispensed or administered the substance on behalf of the dispenser, and

(e). The number of units or volume of such finished forms and/or commercial containers disposed fo in any manner by the registrant, including the date and manner of disposal and the quantity of the substance in finished form disposed.

clarifications by the court.

Finally, Dr. Kiepfer asserts that he was denied due process when the district court permitted the government to amend its indictment after trial and after the defendant's post-trial brief. After trial, the government moved to amend the complaint to include not only the date of order, but also the dates the controlled substances were received and dispensed. The government also sought to amend the complaint to add a claim that Dr. Kiepfer kept diazepam at an unregistered location. The trial court permitted the amendments based on F.R. Civ.P. 15(b). Whether a party should be permitted to amend its pleadings is a decision that we leave to the sound discretion of the district court, and we review only for an abuse of discretion. Moody v. FMC Corp., 995 F.2d 63, 65 (5th Cir. 1993).

The trial court did not abuse its discretion in permitting the amendments. The addition of the dispensing dates to the complaint was only an amplification of the alleged claims. Paragraph 8 of the original complaint alleged that Dr. Kiepfer was required to keep accurate and complete records of all "orders[,] receipts and dispensing by him" of the controlled substances. This paragraph of the complaint was incorporated in each separate count. The trial court did not abuse its discretion in permitting this amendment.

Additionally, the trial court did not abuse its discretion in permitting the government to add the claim that Dr. Kiepfer kept diazepam at an unregistered location. This issue was tried with the implied consent of the parties. See United States v. Shanbaum, 10 F.3d 305, 312-313 (5th Cir. 1994). Dr. Kiepfer testified that he knew he was not permitted to dispense the drug outside of the registered office. There was additional testimony that not all of the diazepam was accounted for at the registered office. Therefore, the trial court did not abuse its discretion in determining that the issue was tried by the consent of the parties.

We are unable to affirm the judgment only because of inaccurate findings as explained herein. We remand the case for further consideration by the district court.

REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA,

Plaintiff(s),

v.

CIVIL ACTION NO.
SA-92-CA-357

RICHARD KIEPFER, M.D.,

Defendant(s).

ORDER ON REMAND

(July3, 1996)

By order dated November 30, 1995, the Fifth Circuit Court of Appeals remanded this case for further factual findings and/or clarification. In response to that order, the Court makes the following additional findings of fact and conclusions of law.

The issue before the Court is whether the Defendant, Dr. Richard Kiepfer, M.D., kept adequate records of the controlled substances which he ordered, received and dispensed as required by the Controlled Substances Act and Drug Enforcement Agency (DEA) regulations. As the Fifth Circuit noted, these records must contain information showing:

(a) The name of the substance;

(b) Each finished form (e.g., 10-milligram tablet or 10-milligram concentration per fluid ounce or milliliter) and the number of units or volume of finished form in each commercial container (e.g., 100-tablet bottle or 3-milliliter vial);

© The number of commercial containers of each such finished from received from other persons, including the date of and number of containers in each receipt and the name, address, and registration number of the person from whom the containers were received;

(d) The number of units or volume of such finished

> form dispensed, including the name and address of the person to whom it was dispensed, the date of dispensing, the number of units or volume dispensed, and the written or type-written name or initials of the individual who dispensed or administered the substance on behalf of the dispenser; and
>
> (e) The number of units or volume of such finished forms and/or commercial containers disposed of in any other manner by the registrant, including the date and manner of disposal and the quantity of the substance in finished form disposed.

21 C.F.R. §1034.24(a) - (e) (1995). Thus, the Court must determine whether Dr. Kiepfer's records contained the required information as to each of the controlled substances he dispensed.

In its original order filed February 27, 1995, the Court noted seventy-seven instances in which Dr. Kiepfer's records were deficient. In making its analysis, the Court considered both the handwritten record of Susan Geiger provided during the DEA's inspection and certain computer-generated records provided after the inspection, without regard to whether the latter records were "readily available" as required by 21 U.S.C. 827(b)(2)(B). Among the deficiencies noted was the failure to record the date each substance was dispensed. In its remand order, the Fifth Circuit noted an apparent discrepancy in the Court's findings, in that "by matching the drug enforcement agency form number on the two sets of records, [one] is able to determine the missing dates," (Remand Order at 6), contrary to this Court's earlier findings.[1]

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[1] The Fifth Circuit provides as an example Count Four, regarding the schedule II controlled substance dilaudid. Although the circuit court determined that, by comparing the DEA form number (910217473) with the same number on the computer generated list, one could determine that the dilaudid was dispensed on August 15, 1991, it appears from this Court's analysis that the correct date was August 17, 1991.

Having further reviewed these two sets of records, the Court nevertheless finds that Dr. Kiepfer did not maintain the required information. As to the entries involving the drugs dilaudid, morphine and pentobarbital, while it is possible to determine the date of dispensing and the number of units or volume dispensed by comparing Susan Geiger's log to the computerized reports, one still cannot ascertain the name, address and registration number of the person from whom the substance was received, the address of the person to whom it was dispensed, the name of the person who dispensed or administered the substance on behalf of the dispenser, and the number of units or volume of substance disposed, if any. The entries for anadrol, nandrolone, testosterone propionate, and testosterone cypionate omit the same information, although the address of the patients to whom the substance was dispensed was available in separate billing records. The Court makes no modification of its findings with respect to the drug phentermine.

Accordingly, the Court hereby reaffirms its original order, subject to the additional findings and clarification contained herein. In addition, the Court concludes that these additional findings do not require modification of the penalties assessed in this Court's original February 27, 1995 order.

SIGNED and ENTERED this 28 day of June, 1996.

/s/ Orlando L. Garcia
ORLANDO L. GARCIA
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA,)
)
Plaintiff,)
v.)
)
RICHARD KIEPFER, M.D.,)
)
Defendant.)

(February 27, 1995)

ORDER

The Court conducted the bench trial of this civil cause of action in July 1994. Assistant United States Attorney Winstanley F. Luke appeared on behalf of the Government. Counsel Bill Blagg represented defendant Richard Kiepfer, M.D. Plaintiff sued Defendant, Richard Kiepfer, M.D. for violations of the Comprehensive Drug Abuse Prevention and Control Act under Title 21, United States Code, Sections 801, et. seq., to recover civil penalties from Defendant.

After reviewing the pleadings, the trial testimony, the exhibits, the parties' post-trial briefs submitted in lieu of closing arguments, the pertinent legal authorities, and the entire record, the Court concludes that Plaintiff's claims against Defendant for violations of the recordkeeping requirements of the Comprehensive Drug Abuse Prevention and Control Act should be resolved in the following manner.

I. Findings of Fact and Conclusions of Law

The Court finds that Defendant, Richard Kiepfer, M.D., is a physician registered with the Drug Enforcement Administration (DEA), and he is authorized to order, receive, and dispense controlled substances pursuant to 21 U.S.C. § 823. Dr. Kiepfer, as a registrant, was required to make, keep, and furnish complete and accurate records of all orders, receipts, and dispensing by

him of controlled substances and dangerous drugs pursuant to 21 U.S.C. § 827; 21 CFR 1301. Dr. Kiepfer was also required to keep a biennial inventory pursuant to stated regulations.[1] 310, 314 (E.D.La. 1990) (physicians in a clinic failed to have a separate registration at each principle place of business, and they failed to include the addresses of the people to whom controlled substances were administered); 21 C.F.R. 1304.02 (h).

In the present case on October 24, 1991, a DEA agent conducted an inventory audit of Dr. Kiepfer for controlled substances for the period beginning October 25, 1989, and ending October 24, 1991.

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[1] § 1304.04 Maintenance of records and inventories.

(a) Every inventory and other records required to be kept under this part shall be kept by the registrant and be available, for at least 2 years from the date of such inventory or records, for inspection and copying by authorized employees of the Administration, except that financial and shipping records (such as invoices and packing slips but not executed order forms subject to § 1305.13 of this chapter) may be kept at a central location rather than at the registered location if the registrant has notified the Administration of his intention to keep central records. Written notification must be submitted by registered or certified mail, return receipt requested, in triplicate, to the Special Agent in Charge of the Administration in the area in which the registrant is located. . .

All notifications must include:

(1) The nature of the records to be kept.

(2) The exact location where the records will be kept.

(3) The name, address, DEA registration number and type of DEA registration of the registrant whose records are being maintained centrally.

(4) Whether central records will be maintained in a manual, or computer readable form . . . 21 CFR § 1304.04.

The controlled substances at issue in this cause of action based on the DEA's inventory audit are categorized as follows:

Schedule II: dilaudid, morphine, pentobarbital;
Schedule III: testosterone propionate, testosterone cypionate, anadrol, and nandrolene decanoate;
Schedule IV: phentermine and diazepam.

21 U.S.C. § 812. Dr. Kiepfer was required to keep a biennial inventory of the controlled substances central to this cause of action unless the records and inventories were part of a statutory exception. See 21 CFR 1304.03.

A. Nonapplicability

The Defendant asserts that an exception is applicable to him under 21 U.S.C. 827 (c)(a)(B) which reads:

> (c). Nonapplicability
> The foregoing provisions of this section shall not apply--
> (1)(A) . . .
> (B) to the administering of a controlled substance in schedule II, III, IV, or V unless the practitioner regularly engages in the dispensing or administering of controlled substances and charges his patients, either separately or together with charges for other professional service, for substances so dispensed or administered or unless such substance is administered in the course of maintenance treatment or detoxification treatment of an individual.

21 U.S.C. 827 (c)(1)(B). Dr. Keipfer, in his defense, claimed the nonapplicability exception as to the dispensing of drugs to his wife because he did not charge her for the medication. Dr. Keipfer's assertion that his wife was not charged for her medication is countered in the evidence by Agent Sullivan's testimony that as she was conducting her inspection on October 24, 1991, she did see billings records for Dr. Keipfer's wife. Moreover, the handwritten log of Susan Geiger, the official records custodian for

Dr. Keipfer's office, which was made available for inspection on October 24, 1991, clearly indicates that on November 19, 1990, a bill was given or sent to "JHK," the initials of Dr. Keipfer's wife. Also, testimony was presented that Dr. Keipfer's wife was the only one for whom Dr. Keipfer prescribed morphine during the two years for which the inspection covered.

While it might be reasonable to presume that a doctor would not charge immediate family members for services or the dispensing of medication, that presumption can be overcome by evidence to the contrary. Agent Sullivan testified that on the October 24, 1992 date of the investigation she did see billings for Dr. Keipfer's wife and the other patients' named in the dispensing records. That testimony of Agent Sullivan coupled with the notation in the record, "Billed JHK<" handwritten by Susan Geiger is sufficient to overcome a presumption that Dr. Keipfer would not charge his wife for the medication. Also, neither Barbee Bigger, former officer manger, or Susan Geiger, present office manager, for Dr. Keipfer testified whether Dr. Keipfer's wife was actually charged for services or medication. The Court finds that the exception in the statute for which a dispensing doctor need not comply with the recordkeeping requirements does not apply in this case. The preponderance of the evidence shows that the "nonapplicability" portion of the statute is not applicable to Dr. Keipfer's wife. See 21 U.S.C. 827 (c)(1)(B).

Dr. Kiepfer also claims that the "nonapplicability" portion of the statute pertains to the dispensing of pentobarbital to his cousin because he did not charge his cousin. However, nothing in the record such as a notation of "no charge" or "do not bill" suggests that Dr. Keipfer's cousin would be treated any differently than any other patient. Agent Sullivan also testified that on the day of the October 24, 1992 investigation, she saw billings in Dr. Keipfer's office for the patients' listed in dispensing record. Therefore, the Court finds by a preponderance of the evidence that the exception of "nonapplicability" does not apply as to Dr. Keipfer's cousin for whom the doctor prescribed pentobarbital.

B. Requirements for Inventories

The requirements for inventories are clearly specified in 21 CFR 1304. Moreover, the specificity of the contents of the

records for the controlled substances are listed in 21 CFR 1304.24.

The recordkeeping inventories are to include the following information:

(a). The name of the substance;

(b). Each finished form (e.g., 10-milligram tablet or 10-milligram concentration per fluid ounce or milliliter) and the number of units or volume of finished form in each commercial container (e.g., 100-tablet bottle or 3-milliliter vial);

(c). The number of commercial containers of each such finished form received from other persons; including the date of and number of containers in each receipt and the name, address, and registration number of the person from whom the containers were received;

(d). The number of units or volume of such finished form dispensed, including the name and address of the person to whom it was dispensed, the date of dispensing, the number of units or volume dispensed, and the written or typewritten name or initials of the individual who dispensed or administered the substance on behalf of the dispenser; and

(e). The number of units or volume of such finished forms and/or commercial containers disposed of in any other manner by the registrant, including the date and manner of disposal and the quantity of the substance in finished form disposed.

21 C.F.R. 1304.24 (a) - (e). The name and address of the person to whom it was dispensed, the date of dispensing, the number of units or volume dispensed, and the initials of the person who dispensed or administered the substance on behalf of the dispenser is not an option. 21 U.S.C. 827; United States v. Green, 905 F.2d 694, 695-65 (3rd Cir. 1990); United States v. Clinical Leasing Service, Inc., 759 F.Supp.310, 314 (E.D.La. 1990).

The purpose of these strict regulations is initially to prevent the improper use of drugs which would be detrimental to the general public's health. Hence, control through registration of and record keeping of all those medications within the distribution chain is a valid means which facilitates the protection of the public's health. United States v. Schiffmann, 572 F.2d 1137, 1140 (5th Cir. 1978). Doctor-Patient Privilege

Dr. Keipfer claims that because his doctor-patient communications are confidential, he does not include the patient's name and address on his computerized list. Consequently, he argues that the details of to whom he dispensed medications are confidential. The doctor-patient privilege for the information sought in this case does not exist under federal statutes and federal rules of civil procedure and evidence.

United States v. Moore, 970 F.2d 48 (5th Cir. 1992) (under an IRS charge for not paying taxes, doctor must produce accounts receivable records indicating the name of each patient, the amount owed, and the indemnifier of each patient; the specifics of the treatment and what information was interchanged at the appointments with the doctor as to treatment were not part of the information sought by the IRS).

The Court finds that in light of the specificity of the statutes, case law, and regulations, Dr. Keipfer's assertion of doctor-patient privilege does not apply as to information sought in this case. Therefore, both the handwritten record of dispensed medication produced by recordkeeper Susan Geiger and Dr. Keipfer's computer generated record of dispensed medication do not comply with the requirements of the applicable statutes, case law, and regulations. 21 U.S.C. 827; United States v. Green, 905 F.2d 694, 695-65 (3rd Cir. 1990); United States v. Clinical Leasing Service, Inc., 759 F.Supp. 310, 314 (E.D. La 1990); 21 C.F.R. 1304.24 (a) - (e).

C. Readily Retrievable Inventory and Records

In addition to the requisite specificity of the name and address of the person to whom the medication was dispensed, the date of dispensing, the number of units or volume dispensed, and the initials of the person who dispensed or administered the

substance on behalf of the dispenser, the record must be "readily retrievable." The clarification of the availability of the records is established in 21 U.S.C. 827 (b), which reads:

> (b) Every inventory or other record required under this section (1) shall be in accordance with, and contain such relevant information as may be required by, regulations of the Attorney General, (2) shall (A) be maintained separately from all other records of the registrant, or (B) alternatively, in the case of non-narcotic controlled substances, be in such form that information required by the Attorney General is readily retrievable from the ordinary business records of the registrant, and (3) shall be kept and be available, for at least two years, for inspection and copying by officers or employees of the United States authorized by the Attorney General.

21 U.S.C. 827 (b).

The Government contends that on October 24, 1991, the date of the inventory, the records which were readily retrievable were Susan Geiger's handwritten record. The Government also contends that no computer records were offered to the Agent Sullivan or Officer Land on that day. However, both Susan Geiger and Barbee Bigger testified that the agent and the officer were both told on October 24, 1991, that Dr. Keipfer also kept records on the computer, but that the agent and officer said they already had all they needed. Those very computer records were submitted to Dr. Keipfer's attorney three months later. Thus, the Government argues that those records were not readily retrievable.

Even in considering both the handwritten record of Susan Geiger and the computer records given to the Government at a much later date, whether the records were readily retrievable need not be considered. The Court finds that both sets of records, handwritten and computer, are deficient and do not comply with the applicable statutes, case law, and regulations. 21 U.S.C. 827; United States v. Clinical Leasing Serv., Inc., 759

F.Supp. at 314; 21 C.F.R. 1304.24 (d). Moreover, "strict liability" prosecutions are upheld under these particular civil violations of the recordkeeping provisions of the Comprehensive Drug Abuse Prevention and Control Act. United States v Green, 905 F.2d at 696 (pharmacy's receipt records accounted for more quantities of drugs than its dispensing records and inventory showed, and strict liability was imposed). Any "inadvertent or innocent" mistakes based on sloppy record keeping are not excusable; rather, such mistakes subject the violator to fines. 21 U.S.C. 842 (c); United States v. Green, 905 F.2d at 695-96 (court found "good faith" errors are not a defense to inaccurate record keeping, and court assessed a $2,000 fine for each count).

Specifically in this case, the records in part lack names, addresses, amounts of medication dispensed, dates dispensed, and initials of the individual doing the dispensing.[1] Based on the testimony presented at trial and the evidence adduced at trial, the Court finds Dr. Keipfer's record keeping was incomplete and was not in compliance with 21 U.S.C. 827 and 21 C.F.R. 1304 in seventy-six (76) counts.[2]

D. Counts of Noncompliance

Dialaudid

The Court finds that Defendant failed to make keep, or furnish a complete and accurate record of dispensing dilaudid, a

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[1] The names and addresses of the patients, as well as the quantity of the controlled substance dispensed and the initials of the dispenser are missing on the required inventory record. Even looking at both Dr. Keipfer's computer generated list and Susan Geiger's list, it is apparent that Dr. Keipfer's failed to make, keep, or furnish complete and accurate records of dispensing.

[2] Although the Government lists ninety (90) counts in their amended complaint and Defendant Keipfer lists eighty-one (81) counts in their response, the Court finds that there are seventy-six (76) counts on which the Government bases this cause of action. Apparently, the use of Roman Numerals caused some confusion in listing the number of counts.

Schedule 2 drug controlled substance, on sixteen (16) occasions on the dates which are listed as Counts I through 16 below. Consequently, 2,710 ml. Of dialaudid are unaccountable for over an approximate three month period in 1991.

Count	Date Ordered	Date Received	Date Dispensed
1	7-11-91	7-24-91	none shown
2	7-16-91	7-26-91	none shown
3	7-19-91	8-02-91	none shown
4	7-21-91	8-06-91	none shown
5	7-30-91	8-12-91	none shown
6	8-06-91	8-20-91	none shown
7	8-12-91	8-23-91	none shown
8	8-19-91	8-28-91	none shown
9	8-26-91	9-18-91	none shown
10	8-29-91	9-26-91	none shown
11	9-03-91	9-12-91	none shown
12	9-09-91	9-18-91	none shown
13	10-03-91	10-15-91	none shown
14	10-08-91	10-21-91	none shown
15	10-14-91	none shown	none shown
16	10-21-91	none shown	none shown

Morphine

The Court finds that Defendant failed to make keep, or furnish a complete and accurate record of dispensing morphine, a Schedule 2 drug controlled substance, on eighteen (18) occasions on the following dates which are listed below as Counts 17 through 34:

Count	Date Ordered	Date Received	Date Dispensed
17	7-16-91	7-26-91	none shown
18	7-19-91	8-02-91	none shown
19	7-24-91	8-06-91	none shown
20	7-30-91	8-12-91	none shown
21	8-06-91	8-20-91	none shown
22	8-12-91	8-23-91	none shown
23	8-19-91	8-28-91	none shown
24	8-26-91	9-18-91	none shown

25	8-29-91	9-26-91	none shown
26	9-03-91	9-12-91	none shown
27	9-09-91	9-18-91	none shown
28	9-12-91	9-26-91	none shown
29	9-18-91	9-30-91	none shown
30	9-23-91	10-03-91	none shown
31	10-03-91	10-15-91	none shown
32	10-08-91	10-21-91	none shown
33	10-14-91	none shown	none shown
34	10-21-91	none shown	none shown

Pentobarbital

The Court finds that Defendant failed to make keep, or furnish accurate record of dispensing pentobarbital, a Schedule 2 drug controlled substance, on two (2) occasions for which there are tow log entries without dates of dispensing, names to whom the pentobarbital was dispensed, and amounts dispensed.

Count	Date Ordered	Date Received	Date Dispensed
35	none shown	none shown	none shown
36	none shown	none shown	none shown

Therefore, 700 capsules of pentobarbital are unaccounted for.

Anadrol

The Court finds that Defendant failed to make, keep, or furnish complete and accurate records of dispensing anadrol, a steroid, which is a Schedule 3 controlled substance on six (6) occasions which are listed as Counts 37 through 42. Although the patients names and addresses are recorded on what appears to be a statement for payment and the quantity of the controlled substance is listed, the dates on which anadrol was ordered, received, or dispensed are not provided.

Count	Date	Date Ordered	Date Received	Date Disp'd
37	5-16-91	none shown	none shown	none shown
38	7-03-91	" "	" "	" "
39	7-09-91	" "	" "	" "
40	9-17-91	" "	" "	" "

41	9-26-91	" "	" "	" "
42	10-2-91	" "	" "	" "

Nandrolone

The Court finds that Defendant failed to make, keep, or furnish complete and accurate records of dispensing Nandrolone, a steroid, which is a Schedule 3 controlled substance on seven (7) occasions which are listed as Counts 43 through 49. Although the patients names and addresses are recorded on what appears to be a statement for payment and the quantity of the controlled substance is listed, the dates on which nanadrolone was ordered, received, or dispensed are not provided.

Count	Date	Date Ordered	Date Received	Date Disp'd
43	5-16-91	none shown	none shown	none shown
44	6-11-91	" "	" "	" "
45	6-27-91	" "	" "	" "
46	7-09-91	" "	" "	" "
47	9-17-91	" "	" "	" "
48	9-26-91	" "	" "	" "
49	10-2-91	" "	" "	" "

Testosterone Propionate

The Court finds that Defendant failed to make, keep, or furnish complete and accurate records of dispensing testosterone propionate a steroid, which is a Schedule 3 controlled substance on six (6) occasions which are listed as Counts 50 through 55. Although the patients names and addresses are recorded on what appears to be a statement for payment and the quantity of the controlled substance is listed, the dates on which testosterone propionate was ordered, received, or dispensed are not provided.

Count	Date	Date Ordered	Date Received	Date Disp'd
50	5-16-91	none shown	none shown	none shown
51	6-11-91	" "	" "	" "
52	6-27-91	" "	" "	" "
53	7-09-91	" "	" "	" "

54	9-17-91	"	"	"	"	"	"
55	10-2-91	"	"	"	"	"	"

Testosterone cypionate

The Court finds that Defendant failed to make, keep, or furnish complete and accurate records of dispensing testosterone cypionatea steroid, which is a Schedule 3 controlled substance on seven (7) occasions which are listed as Counts 57 through 62. Although the patients names and addresses are recorded on what appears to be a statement for payment and the quantity of the controlled substance is listed, the dates on which testosterone cypionate was ordered, received, or dispensed are not provided.

Count	Date	Date Ordered	Date Received	Date Disp'd
56	6-11-91	none shown	none shown	none shown
57	6-27-91	" "	" "	" "
58	7-09-91	" "	" "	" "
59	9-17-91	" "	" "	" "
60	9-26-91	" "	" "	" "
61	10-2-91	" "	" "	" "
62	10-22-91	" "	" "	" "

Phentermine

The Court finds that Defendant failed to make, keep, or furnish complete and accurate records of dispensing phentermine which is a Schedule 4 controlled substance on eight (8) occasions which are listed as Counts 63 through 70. Although the patients names and addresses are recorded on what appears to be a statement for payment and the quantity of the controlled substance is listed, the dates on which phentermine was ordered, received, or dispensed are not provided.

Count	Date Ordered	Date Received	Date Dispensed
63	none shown	none shown	7-26-90
64	" "	" "	7-26-90
65	" "	" "	8-02-90
66	" "	" "	9-20-90

67	"	"	"	"	9-20-90
68	"	"	"	"	10-31-90
69	"	"	"	"	10-31-90
70	"	"	"	"	11-1-90
71	"	"	"	"	1-22-91
72	"	"	"	"	1-22-94
73	"	"	"	"	2-04-91
74	"	"	"	"	2-28-91
75	"	"	"	"	2-28-91

Diazepam

Count seventy-six (76) addresses the issue of storing the controlled substance diazapam at a physical location other than Dr. Keipfer's registered location. The Court finds based on the testimony presented at trail that Dr. Kiepfer stored diazepam, a controlled substance, at another location other than his registered location. The other location was unregistered with DEA. Although Dr. Keipfer claims that the Texas State Board of Medical Examiners, Rules and Regulations (1990) provides that a physician may dispense a controlled substance away from the office, federal regulations are strictly applied. See United States v Green Drugs, 905 F.2d at 696.

The Court concludes that Dr. Keipfer's storing of diazepam for dispensing at a location other than his registered location was a violation of the statute and regulations. United States v. Clinical Leasing Service, Inc., 925 F.2d 120, 123 (5th Cir. 1991); 21 C.F.R. 130123 (a)(3).

II. Penalties

For violations of 21 U.S.C. 827 and 21 U.S.C. 842 and the regulations thereunder, 21 C.F.R. 1300, the statute provides for monetary civil penalties of up to $25,000.

§ 842. Prohibited acts B

.....

(C)(1) Except as provided in paragraph (2), any person who violates this section shall, with respect to any such violation, be subject to a civil penalty of not more than $25,000. The district courts of the United States (or,

where there is no such court in the case of any territory or possession having the jurisdiction of a district court of the United States in cases arising under the Constitution and laws of the United States) shall have jurisdiction in accordance with section 1355 of Title 28 to enforce this paragraph.

21 U.S.C. 842 (c)(1).

In the case at hand, the Government alleges seventy-six (76) counts against Defendant Dr. Keipfer. The Court finds that Dr. Keipfer did violate the United States Code on each and every one of the seventy-six counts. Although up to $25,000 per violation can statutorily be imposed, for each count, the Court finds that a civil penalty of $2,000.00 for each of the violations shall be assessed against Dr. Keipfer and payable to the Government of the United States of America.[1] The total penalty to be paid for the violations in the seventy-six (76) counts is $152,000.00

The Court, based on a preponderance of the evidence, concludes that Dr. Keipfer did violate federal statutes and regulations on seventy-six counts. Accordingly, the Government's claims against Dr. Keipfer are hereby GRANTED, and Dr. Keipfer is hereby ORDERED to pay $152,000.00 in penalties to the Government of the United States of America.

It is so ORDERED. SIGNED this _____ of February, 1995.

/s/ Orlando L. Garcia
ORLANDO L. GARCIA
UNITED STATES DISTRICT JUDGE

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[1] The amount of $2,000.00 per violation is an appropriate amount to be assessed for penalties under these type of civil violations. United States v. Green Drugs, 905 F.2d 694 (3rd Cir. 1990)($6,000 penalty was assessed in a three count complaint alleging failure to keep complete and accurate records).

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
v.	)
	)
RICHARD KIEPFER, M.D.,	)
	)
Defendant.	)

(December 15, 1995)

PLAINTIFF'S PROPOSED AMENDED ORDER
ON REMAND BY THE FIFTH CIRCUIT TO THIS COURT
FOR FURTHER DETERMINATIONS OR CLARIFICATIONS

Comes Now Plaintiff, the United States of America, and for its Proposed Amended Order On Remand By the Fifth Circuit To This Court For Further Determinations Or Clarifications respectfully proposes that the Court clarifies its Order filed February 27, 1995 by entering the following proposed Amended Order:

Amended Order On Remand

Title 21 U.S.C. § 827(A) (3) provides that each registrant, upon first engaging in the manufacture, distribution, or dispensing of controlled substances shall "maintain, on a current basis, a complete and accurate record of each such substance manufactured, received, sold, delivered or otherwise disposed of." The records must be maintained in strict accordance with regulations promulgated by the Attorney General and must be maintained separately from all other records of the registrant. Id. 827(b).

This Court specifically finds that the records in part lack names, addresses, amounts of medication dispensed, dates

dispensed, and initials of individuals doing the dispensing. The question then remains whether the Court should look at the Susan Geiger log and Dr. Kiepfer's computer generated logs[1] to reconcile them. This court holds that the statute and the regulations mandate that the Susan Geiger log and/or Dr Kiepfer's computer generated logs individually, must comply in full with the detailed recordkeeping requirements of the section 827(b). That Dr. Kiepfer maintains a system by which reference must be made to both Susan Geiger's log and to his latent computer generated logs to determine whether there is full compliance with the regulations violates the recordkeeping provisions of the section 827(b). United States v. Clinical Leasing, Serv. Inc., 759 F.Supp.310, 314 (E.D. La. 1990).

The Fifth Circuit panel in its Opinion filed November 30, 1995 stated that Dr. Kiepfer was required to maintain records with the following information:

(a) The name of the substance;

(b) Each finished form (e.g., 10 - milligram tablet or 10 - milligram concentration per fluid ounce or milliliter) and the number of units or volume of finished from in each commercial container (e.g., 100-tablet or 3 - milliliter vial);

(c). The number of commercial containers of each such finished form received from other persons, including the

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[1] The Court is aware of three (3) computer logs submitted by Dr. Kiepfer in this action. These are:

1.the computer log submitted three months after the October 21, 1991 inspection to the Assistant U.S. Attorney by his lawyers (first computer log);

2.the computer log he submitted during his state court trial 1 ½ years after the October 21 inspection (second computer log); and

3.a computer log bearing the date July 25, 1995 (third computer log) which was apparently submitted by Dr. Kiepfer in the Appendix to his Fifth Circuit brief, and which was not in evidence before this Court.

The third computer log is submitted with this Proposed Amended Order as Exhibit 2.

date of and number of containers in each receipt and the name, address, and registration number of the person from whom the containers were received;

(d) The number of units or volume of such finished form dispensed, including the name and address of the person to whom it was dispensed, the date of dispensing, the number of units or volume dispensed, and the written or typewritten name or initials of the individual who dispensed or administered the substance on behalf of the dispenser; and

(e) The number of units or volume of finished forms and/or commercial containers disposed of in any other manner by the registrant, including the date and manner of disposal and the quantity of the substance in finished form disposed of.

21 C.F.R. § 1304.24.

Even if this Court were to reconcile the computer log first presented at the government 3 months after the inspection ("the first computer log"), the state trial computer log generated 1 ½ years after the inspection ("the second computer log") with the Susan Geiger log, the only log presented to the Diversion Agent, they, together, still violate the recordkeeping regulation.

For example, focusing on the drug dilaudid for the period July, 11 to October 21, 1991, the Court finds that the Susan Geiger log, which was readily given to the government agents on October 21, 1991, gives the strength of the dilaudid (20 mg/ml), the DEA number, the date ordered, the date received (except for order dates 10-19 and 10-21), and the number of vials ordered - units of finished form in each commercial container - only for order dates 8-29 through 10-21. The Susan Geiger log fails to show 1) the name, 2) the address, 3) the registration number of the person from whom the containers were received, 4) the name, 5) the address of the person to whom it was dispensed, 6) the date of dispensing, 7) the number of units or volume dispensed, 8) the written or type written name of the individual who dispensed or administered the substance on behalf of the dispenser, and 9) the number of units or volume of finished forms and/or commercial containers disposed of, in violation of 21

C.F.R. § 1304.24.

Focusing next on the first computer log, the initial computer generated log presented to the government 3 months after the inspection for the same time period, the Court finds that it states the DEA number, the dates dilaudid was received, a number (presumably the number of vials received), the dates of dispensing and a number (presumably the number of vials dispensed). This computer log however, fails to show 1) the name, 2) the address, 3) the registration number of the person from whom the containers were received, 4) the name, 5) the address of the person to whom it was dispensed, 8) the written or type written name of the individual who dispensed or administered the substance on behalf of the dispenser, 9) and the number of units or volume of finished forms and/or commercial containers disposed of,[2] clearly still in violation of 21 C.F.R § 1304.24. Reconciling the Susan Geiger log with the first computer log demonstrates that for the same time period, together, they do not comply with the regulation. They do not show 1) the name, 2) the address, 3) the registration number of the person from whom the containers were received, 5) the address of the person to whom it was dispensed, 8) the written or type written name of the individual who dispensed or administered the substance on behalf of the dispenser, 9) and the number of units or volume of finished forms and/or commercial containers disposed of, clearly still in violation of 21 C.F.R § 1304.24.

Focusing on the second computer record, the computer log generated by Dr. Kiepfer a full 1 ½ years after the inspection for the state trial,[3] the Court finds that it only adds to the first computer log that all dilaudid was dispensed to Janet Henderson Kiepfer. Reconciling the two computer logs introduced into

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[2] See Table I "Missing Entries in Violation of 21 C.F.R. § 1304.24, Dr. Kiepfer's Dilaudid Logs, Order Dates July 11 - October 21, 1991," attached hereto as Exhibit 1.

[3] This record was only presented at trial and not before.

evidence at trial with the Susan Geiger log shows that even collectively, Dr. Kiepfer fails to satisfy the recordkeeping requirements of the regulation. Combined, all three logs fail to show 1) the name, 2) the address, 3) the registration number from whom the containers were received, 5) the address of the person to whom it was dispensed, 8) the written or type written name of the individual who dispensed or administered the substance on behalf of the dispenser, 9) and the number of units or volume of finished forms and/or commercial containers disposed of, clearly still in violation of 21 C.F.R § 1304.24.[4]

Reconciling all of Dr. Kiepfer's computer logs produced in this matter with the Susan Geiger log by combining the, this Court finds that they still fail to satisfy the recordkeeping requirements of the regulation. Combined, they do not show 1) the name, 2) the address, 3) the registration number of the person from whom the containers were received, 5) the address of the person to whom it was dispensed, 8) the written or type written name of the individual who dispensed or administered the substance on behalf of the dispenser, and 9) the number of units or volume of finished forms and/or commercial containers disposed of, and accordingly, they are in violation of the recordkeeping requirements of 21 U.S.C. § 827 (a) (3) and 21 C.F.R § 1304.24.

Further, the Act requires that the records of the registrant "shall be kept and be available. . . for inspection and copying by officers or employees of the United States authorized by the Attorney General," 21 U.S.C § 827(b) (3), and also authorizes administrative inspections and warrants to enforce its provisions. 21 U.S.C. § 880. The officers or employees authorized by the Attorney General to make the inspections under the Act are employees of the DEA such as Diversion Agent Sullivan. 21

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[4] This Court also carefully considered the Court of Appeals examining of the DEA form number (910217473) listed on the records received by the DEA agent during the inspection and the same DEA number on the computer generated list on August 15, 1991, but was unable to discern that dialudid was indeed dispensed on that date but rather, seemed to have been dispensed on August 17, 1991.

C.F.R §§ 1316.02 and 1316.03.

The Court finds that none of the four logs presented by Dr. Kiepfer to the United States for inspection comply with the regulations. 21 U.S.C. § 827(a)(3); 21 C.F.R. § 1304.24. Because the statute mandates that the Susan Geiger log and the computer logs individually comply with the detailed recordkeeping requirements of the regulation, United States v. Clinical Leasing, Serv. Inc., supra, 759 F.Supp. At 314, the Court will consider for imposing a penalty under the Act the Susan Geiger log which was the readily available log inspected and copied by the DEA agent.

With these further findings and clarifications as mandated by the Court of Appeals, this Court hereby incorporates and re-affirms its findings as stated in section "D. Copunts of Noncompliance," and reimposes the penalties as stated in part "II. Penalties," in its order filed February 27, 1995.

Accordingly, Dr. Kiepfer is hereby ORDERED to pay $152,000 in penalties to the Government of the United States of America, together with its costs for this action.

It is so ORDERED. SIGNED this _____ day of

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITES STATES OF AMERICA,	*
	*
Plaintiff,	*
V.	*
	*
RICHARD KIEPFER, M.D.,	*
	*
Defendant.	*

(July 7, 1993)

ORDER OF RECUSAL

On this day came on to be considered sua sponte the matter of the propriety of the undersigned acting as the judge in the above-referenced cause. Title 28 U.S.C. §455 requires disqualification in any proceeding in which the judge's impartiality might reasonably be questioned. This judge is an ongoing patient of Dr. Barry Beller. The court reporter is likewise a patient of Dr. Barry Beller. In 1989, the defendant recovered a judgment of several million dollars against Dr. Beller. It is the Court's understanding that certain governmental agencies investigated the defendant after having been approached by Dr. Beller with complaints against him.

After having brought the above to the attention of the parties, the defendant has requested that the Court recuse itself from the instant action. The undersigned finds its relationship to Dr. Beller (an individual indirectly connected to matters likely to come forward in a trial before the Court), creates an uncomfortable situation as well as the appearance of impropriety. Recusal is therefore necessary.

It is therefore ORDERED that this action be removed from the docket of the undersigned, and reassigned to Senior District

Judge Lucius D. Bunton, III. Judge Bunton has consented to the assignment.

SIGNED this 7th day of July, 1993.

/s/ H. F. Garcia

H. F. GARCIA
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
v.	)
	)
RICHARD KIEPFER, M.D.,	)
	)
Defendant.	)

(April 2, 1992)

COMPLAINT

Comes now Plaintiff, the United States of Ameica, by and through its attorney, Ronald F. Ederer, United States Attorney for the Western District of Texas, and for its Complaint respectfully alledges as follows:

1. This is a civil action brought by the United States to recover civil penalties from the Defendant, Richard Kiepfer, under the Comprehensive Drug Abuse Prevention and Control Act, 21 U.S.C. § 801, et seq..

2. This Court's subject matter jurisdiction is invoked pursuant to 28 U.S.C. § 1345 and 21 U.S.C. §§ 827 (a), (b) & 842 (a) (5).

3. Defendant Richard Kiepfer is a physician registered with the Drug Enforcement Administration (DEA) and he is authorized to order, receive and dispense controlled substances pursuant to 21 U.S.C. § 823.

4. As a registrant, Defendant, Richard Kiepfer, was required to make, keep and furnish complete and accurate records of all

PAGE 2 MISSING

10. Defendant failed to make, keep or furnish co;mplete and accurate records of dispensing of a Schedule 2 drug controlled substance, to wit, dilaudid, on each of the following dates:

(1)	7/11/91
(2)	7/16/91
(3)	7/19/91
(4)	7/21/91
(5)	7/30/91
(6)	8/06/91
(7)	8/12/91
(8)	8/19/91
(9)	8/26/91
(10)	8/29/91
(11)	9/03/91
(12)	9/09/91
(13)	10/08/91
(14)	10/14/91
(15)	10/21/91

each failure is a violation of 21 U.S.C. § 827 (a) and (b) and 21 CFR Parts 1304.01(c), .03(d), .24 and subjects the Defendant to a penalty of $25,000 for each violation.

11. As a result of these violations, the Defendant was unable to account for 2,710 ml. Of dilaudid.

12. Defendant failed to take a biennial inventory of dilaudid as required by 21 U.S.C. § 827(a) (1), a prohibited act under 21 U.S.C. § 842(a) (5) subjecting Defendant to a penalty of $25,000 for the violation.

Counts XVII-XXXVII

13. Repeats and realleges each and every allegation or paragraphs 1- 8, as if the same were fully set forth herein.

14. Defendant failed to make keep or furnish complete and accurate records of dispensing of a Schedule 2 drug controlled substance, to wit, morphine on each of the following dates:

(1)	7/16/19
(2)	7/19/91

(3)	7/24/91
(4)	7/30/91
(5)	8/06/91
(6)	8/12/91
(7)	8/19/91
(8)	8/26/91
(9)	8/29/91
(10)	9/03/91
(11)	9/09/91
(12)	9/12/91
(13)	9/18/91
(14)	9/23/91
(15)	10/03/91
(16)	10/08/91
(17)	10/14/91
(18)	10/21/91

each failure is a violation of 21 U.S.C. § 827(a) and (b) and 21 CFR Parts 1304.01(c), .03(d) and .24, and subjects the Defendant to a penalty of $25,000 for each violation.

15. As a result of these violations, the Defendant was unable to account for 2,960 ml. Of morphine

16. Defendant failed to take a biennial inventory of morphine as required by 21 U.S.C. § 827(a) (a), a prohibited act under 21 U.S.C. § 842 (a) (5), subjecting the Defendant to a penalty of $25,000 for the violation.

Counts XXXVIII-XXXIX

17. Repeats and realleges each and every allegation of paragraphs 1-8, as if the same were fully set forth herein.

18. Defendant failed to make, keep or furnish complete and accourate records of dispensing of a Schedule 2 drug controlled substance, to wit, pentobarbital, in violation of 21 U.S.C. § 827(a) and (b) and 21 CFR Parts 1304.01(c), .03(d) and .24, and as the result Defendant was unable to account for 700 pentobarbital capsules. Defendant is subject to a penalty of $25,000 for such violation.

19. Defendant failed to take a biennial inventory of pentobarbital as required by 21 U.S.C. § 827(a) (1), a prohibited

act under 21 U.S.C. § 842(a) (5), subjecting Defendant to a penalty of $25,000 for the violation.

Counts XL-XLVII

20. Repeats and realleges each and every allegation of paragrphs 1-8 as if the same wre fully set forth herein.

21. Defendant failed to make, keep or furnish complete and accurate records of dispensing of a Schedule 3 controlled substance, to wit, anadrol, a steroid, on each of the following dates:

(1) 5/16/91
(2) 7/03/91
(3) 7/09/91
(4) 9/17/91
(5) 9/26/91
(6) 10/02/91

each is a violation of 21 U.S.C. § 827(a) and (b) and 21 CFR Parts 1304,01(c), , 03(d) and .24, and subjects Defendant to a penalty of $25,000 for each violation.

22. Defendant failed to take a beginning inventory of anadrol as required by 21 U.S.C. § 827(a) (1), a prohibited act under 21 U.S.C. § 842(a) (5), subjecting Defendant to a penalty of $25,000 for the violation.

XLVII-LVI

23. Repeats and realleges each and every allegation of paragraphs 1-8, as if the same were fully set forth herein.

24. Defendant failed to make, keep or furnish complete and accurate records of dispensing of a Schedule 3 controlled substance, to wit, nandrolone, a steroid, on each of the following dates:

(1) 5/16/91
(2) 6/11/91
(3) 6/27/91
(4) 7/09/91
(5) 9/17/91
(6) 9/26/91
(7) 10/02/91

each is a violation of 21 U.S.C. § 827(a) and (b) and 21 CFR Parts 1304,01(c), , 03(d) and .24, and subjects Defendant to a penalty of $25,000 for each violation.

25. Defendant failed to take a beginning inventory of nandrolone as required by 21 U.S.C. § 827(a) (1), a prohibited act under 21 U.S.C. § 842(a) (5), subjecting Defendant to a penalty of $25,000 for the violation.

LVII-LXIV

26. Defendant failed to make, keep or furnish complete and accurate records of dispensing of a Schedule 3 controlled substance, to wit, testosterone propionate, a steroid, on each of the following dates:

(1) 5/16/91
(2) 6/11/91
(3) 6/27/91
(4) 7/09/91
(5) 9/17/91
(6) 10/02/91

each failure is a violation of 21 U.S.C. § 827(a) and (b) and 21 CFR Parts 1304,01(c), . 03(d) and .24, and subjects Defendant to a penalty of $25,000 for each violation.

27. Defendant failed to take a beginning inventory of testosterone propionate as required by 21 U.S.C. § 827(a) (1), a prohibited act under 21 U.S.C. § 842(a) (5), subjecting Defendant to a penalty of $25,000 for the violation.

LXV-LXXIII

28. Repeats and realleges each and every allegation of paragraphs 1-8, as if the same were fully set forth herein.

29. Defendant failed to make, keep or furnish complete and accurate records of dispensing of a Schedule 3 controlled substance, to wit, testosterone cypionate, a steroid, on

each of the following dates:

(1)	6/11/91
(2)	6/27/91
(3)	7/09/91
(4)	9/17/91
(5)	9/26/91
(6)	10/02/91
(7)	10/22/91

each failure is a violation of 21 U.S.C. § 827(a) and (b) and 21 CFR Parts 1304,01(c), , 03(d) and .24, and subjects Defendant to a penalty of $25,000 for each violation.

30. Defendant failed to take a beginning inventory of testosterone cypionate as required by 21 U.S.C. § 827(a) (1), a prohibited act under 21 U.S.C. § 842(a) (5), subjecting Defendant to a penalty of $25,000 for the violation.

Counts LXXIV-LXXXIX

31. Repeats and realleges each and every allegation of paragraphs 1-8, as if the same were fully set forth herein.

32. Defendant failed to make, keep or furnish complete and accurate records of dispensing of a Schedule 4 controlled substance, to wit, phentermine, on each of the following dates:

(1)	7/26/90	(twice)
(2)	8/02/90	
(3)	9/20/90	(twice)
(4)	10/31/90	(twice)
(5)	11/01/90	
(6)	1/22/91	(twice)
(7)	2/04/91	
(8)	2/28/91	(twice)

each failure is a violation of 21 U.S.C. § 827(a) and (b) and 21 CFR Parts 1304,01(c), , 03(d) and .24, and subjects Defendant to a penalty of $25,000 for each violation.

33. Defendant failed to take a biennial inventory of phentermine as required by 21 U.S.C. § 827(a) (1), a prohibited act under 21 U.S.C. § 842(a) (5), subjecting Defendant to a penalty of $25,000 for the violation.

Respectfully submitted,

RONALD F EDERER
United States Attorney

By: /s/Winstanley F. Luke

WINSTANLEY F. LUKE
Assistant United States Attorney
727 E. Durango Blvd., A-601
San Antonio, Texas 78206
Tel. (512) 229-4253/FTS: 730-4253

Mr. LUKE: Now, you said that you went to --

THE COURT: -- Not that that wouldn't be possible, but go ahead.

MR. LUKE: Thank you. You said you went to Dr. Kiepfer's office. Would you tell the Court what happened when you got there?

A. When we arrived at Dr. Kiepfer's registered location, we were met by Ms. Geiger. Ms. Geiger informed us that Dr. Kiepfer was currently in San Antonio at one of his other locations.

Q. You used the term registered location. Would you tell the court what that is?

A. Registered location is the location where the person authorized to handle controlled substances may store -- has to store the records and has to store all controlled substances.

Q. When you say the person authorized to handle the drug controlled substances, what it that?

A. That is the registrant, which, in this case, would be Dr. Kiepfer.

Q. Is this someone that has to be registered with the D.E.A?

A. Correct, they apply for an agreement of D.E.A. registration.

Q. Was Dr. Kiepfer at that time a registrant with the D.E.A.?

A. Yes, he was at the Boerne location.

Q. Now, you say you went to his authorized location. What occured at that time?

A. We met with Ms. Geiger. She informed us that Dr. Kiepfer

was at his office here in San Antonio. We told Ms. Geiger that we were there to perform a routine audit of the controlled substances.

She contacted Dr. Kiepfer and spoke with him, and she came back and said that he told her to cooperate. We presented Ms. Geiger with a notice of inspection, which is something that is to be given any time we enter a registered location.

Q. I'd like for you to turn to P-6. On the first page of P-6 is this the notice of inspection that you gave to Ms. Gieger?

A. Yes, it is.

Q. Did she execute it before you?

A. Yes, she signed it before us.

Q. And you witnesse that.

A. Yes, I did.

Q. The front and the back was attached to that document at that time, it that right?

A. Yes, it's a three part document.

Q. Your Honor, we have not moved P-6 into evidence, this page, your Honor, and I would now move it. My recollection is that it's not –

THE COURT: –It's admitted.

MR. BLAGG: Note my objection to that.

THE COURT: The objection is noted and overrulled. (Plaintiff's Exhibit 6 admitted into evidence.)

MR. LUKE: After you gave her notice, could you

Q. Because you're the only person--none of the agents, I don't think, ever even talked to Dr. Kiepfer except for you. You're the only one I find.

I understand you went out on some date after the audit and found him in the San Antonio office on Babcock Road, it that true?

A. Correct.

Q. And did he agree to see you? I mean, he didn't hide from you or run away or anything like that, did he?

A. No.

Q. And you were looking for some diazepam?

A. Yes.

Q. What is that, is that Valium?

A. Yes.

Q. And you had heard of Susan said he might have it in his San Antonio office?

A. Susan told me that that was where it was located at.

Q. So, you went out to inspect it.

A. Yes.

Q. And you did inspect it?

A. We counted it, yes.

Q. Did you tell Dr. Kiepfer at that time that he was under suspicion of violation of criminal law?

A. At that time, no.

Q. Did you tell him that he had been targeted by the D.E.A. and D.P.S. for indictment?

A. No.

Q. Why not?

A. Because he wasn't at that time.

Q. Well, let's see about that. Look at your -- if you don't have it, I have a report of yours written on -- date prepared, it was prepared on October 31st, 1991, and it indicates to me that by that time -- let me find it.

"Target of the investigation was Dr. Richard Kiepfer in Boerne, Texas. Objective was to show that he was negligent and seek prosecution in violation of Title 21, United States Code, Section 842."

Are you familiar with this report that you prepared on October 31st, 1991?

A. Yes, I am.

Q. Would you like to see it and refresh your memory?

A. Yes.

Q. May I approach?

THE COURT: Yes, you may.

MR. LUKE: May I approach so I can see the report?

THE COURT: Yes, you may.

(Pause)

MR. BLAGG:On the next page -- okay. Now, after

reading this report, does it refresh your memory that you put down in writing in official DrugEnforcement Administration records that Dr. Kiepfer had already been targeted by D.E.A., at least, and probably D.P.S. for violation of civil and criminal statutes.

A. I believe the report said, "will be targeted."

Q. Okay. It says, "Target of the investigation. The main target of this investigation will be Dr. Richard Kiepfer?

A. Correct.

Q. So, he was targeted, correct?

A. Yes, but it was still in the investigative process.

Q. All right. It says, "Objective: To obtain evidence to prove that Kiepfer was negligent in his record keeping of controlled substances and seek prosecution under 21, U.S.C., 842 (a) (5)." That's your objective, correct.?

A. Yes.

Q."And also try to obtain evidence that Richard Kiepfer is dispensing steroidsfor a non valid medical reason and to seek prosecution for violation of 21, U.S.C., 841 (a)(1) and corresponding law of the State of Texas."

That was your official report, was it not?

A. Yes, it is.

Q. And then the following day you prepared a report, November 1st, 1991, which talks about going and visiting Susan Geiger and the records out there that you obtained, it that correct?

A. Correct.

Q. Finally, you prepared a report, I think, concerning going and visiting Dr. Kiepfer at his Babcock Road address,is that correct?

A. Correct.

Q. You visited Dr. Kiepfer after October 31st, 1991, isn't that true?

A. Yes, the next day.

Q. Pardon me?

A. The next day, November 1st.

Q. November 1st, the following day, you visited Dr. Kiepfer.

A. Yes.

Q. The question had was since you had already targeted him for criminal prosecution and he had seen you and you had talked to him, did you think it not at least advisable or fair to tell him that he was a suspect and that he needed to provide more records if he had them, or anything like that?

A. We targeted him for an investigation and --no.

Q. At any time--you worked with Mr. Land in working up the criminal case too, did you not?

A. I assisted Mr. Land.

Q. At no time did you ever go to Dr. Kiepfer's office, or any place, or call Dr. Kiepfer or do anyting, make any contact with him asking him for any computer records, isn't that true?

A. I never knew there were computer records to ask for.

the dispensing of any morphine on that date, is that correct?
A. Correct
Q. If you look down to the final one, number eighteen, 10/21/91. Once again, you do you have records that indicate or any evidence that you could supply the Court 5.that there was actually dispensing of any morphine on 10/21/91?
A. No.
Q. The activity you show, in fact, from the logs is that some morphine was ordered on that particular date, it that correct?
A. Correct.
Q. Just one other thing. I forgot to ask you when you visited Dr. Kiepfer's office, isn't it true that there were computers in the front room at the secretary's desk when you walked in the door?
A. Yes.
Q. And isn't it true that there were computers back near the drug room back 15. there where the drugs were actually being counted by you and Mr. Land and Ms. 16.Gieger?
A. I didn't count computer. I know there were computers on the front desk.
Q. Thank you. Are you positive that when you testified that steroids were a controlled substance in Texas in maybe '89 or 1990, are you sure about that? I ask you sure about that? I ask you to take into consideration how complex and complicated the Texas Controlled Substance Act is.

of that very same hard book? If you look at the very back part of the book, there's a section between – U. S. C. 827. That's what we are looking at.

A. I found it.

Q. It was amended in 1984, Judge. This is the section I'm talking about, 827.

A. Okay

Q. All right. This is the section we talked about that makes it a legal requirement under the official law of the United States to keep and maintain records for physicians and practitioners. This section that I's asking you to read to the Judge is Section 827 (c)(1)(B), which is under "Non-applicability."

A. "To the administering of controlled substances, Schedules II, III, IV, V, unless the practitioner regularly engages in dispensing or administering of controlled substances and charges his patients either separately or together with charges for other professional services for substances is so dispensed or administered in the or unless such substance is administered in the course of maintenance treatment or detoxification treatment of an individual."

Q. Is there any evidence that you've come up with that anybody else other than Janet Henderson Kiepfer received the morphine?

A. We have no evidence to show that.

Q. Or the Dilaudid?

A. No evidence to show that.

Q. Or the--is there another one she received?

A. Not that I know of.

Q. Do you have any evidence--can tell the Judge whether or not you found any evidence Dr. Kiepfer was charging her for professional services and for these drugs?

A. I know they were charging her for the drugs because we were trying to do the audit and were looking for different documentation, and Ms. Gieger stated that there were billing records.

Q. Do you have any of those billing records?

A. No, I did not make copies of billing records.

Q. You know that Janet Henderson Kiepfer is Dr. Kiepfer's wife, is that correct?

A. Yes.

Q. If he was not charging his wife, and if he was not either administering in the course of maintenance, treatment or detoxification treatment, then is it true that Dr. Kiepfer--and those two drugs, morphine and dilaudid, were only given to her, dispensed to her, is it true that Dr. Kiepfer would not have to maintain records on those drugs, based on that law?

A. My understanding is there's a difference between dispensing and administering in definition.

Q. Do you have any question that Dr. Kiepfer administered those controlled substances to his wife as a physician?

the right thing.

Q. When the doctors that you were working for learned of this, did they--what happened?

A. They terminated my employment and attempted to blackball me in the community.

Q. Is there an actual recording of them telling you that they intended to do that?

A. I recorded the meeting at which they told me that they felt it was abhorrent for a doctor to testify against another doctor in a medical malpractice case and that they would no longer associate with me.

Q. Did it also say that you wouild be ruined for doing what you've done?

A. Yes.

Q. And did it almost ruin you?

A. Yes, it did.

Q. I told the Judge that that case was tried I believe in this court before the chief judge who's the chief judge now, Judge Pullitz (phonetic), is that correct?

A. That's correct.

Q. And judgment in your favor was granted, is that correct?

A. That's correct.

Q. Did there come a time during this time frame where you had become designated as a medical expert witness in a case which had been filed against Dr. Julius Marlo who was an ear, nose and

throat physician here in San Antonio.
A. Yes, there was.
Q. Do you recall what year that was?
A. That was in 1986.
Q. Had you--withdraw. Did someone after that designation were you visited by a D.E.A. Diversion agent and your premises inspected?
A. I was diverted-- I was visited by two six-gun carrying D.E.A. agents and my premises were inspected.
Q. Do you now know who one of those persons was?
A. One of the persons was the son of Dr. Julius Marlo.
Q. Is his name Edward Marlo?
A. Yes, he was a D.E.A. agent from Houston.
Q. Was that the first inspection that you had on controlled substances?
A. Yes, it was.
Q. And that was when?
A. 1986, I believe.
Q. I htink there's testimony it might have been in '87.
A. It could have been.
Q. Then the next time you were inspected was the current inspection in 1991?
A. Theat is correct.
Q. Have you experience on computers?
A. Yes, I have.

Q. Did she have access to your computer to obtain the records?
A. She had access to the computer, and if the records had ever been asked for she could have called me, or someone in the office could have called me, and I could have talked them through how to produce a hard copy from the records.
Q. All right. Did you consider--were you--you were made aware of what was going on, is that correct?
A. No, I was not.
Q. Your notice of what was going on came from Susan Geiger?
A. Yes.
Q. What did you believe that that was?
A. I was told it was a routine inspection.
Q. Now, in any other time did you have nay contact by D.E.A. or D.P.S. to you personally requesting records?
A. No.
Q. Did there come a time after the inspection when you spoke to Lisa Sullivan at your Babcock office?
A. Yes.
Q. What was that about?
A. That was about the presence of some valium which was an emergency drug for some of the patients that we were caring for at the Babcock office. She said that if we were taking if from the registered lication to another location, we should register the other location.
She said that, one, she was more interested in, at that

discuss law with you, Counselor, but I think if you are reading Section D, you'll find that applies to what had happened.
Q. Your Honor, I'd ask the Court to take judicial notice of registrations for separate locations, specifically with regard to practitioners, 21, C.F.R.
THE COURT: All right.
MR. BLAGG: Your Honor, we'd ask the court to take judicial notice of that same Section 1301.23, Section 3, which provides the exception.
THE COURT: All right .
MR. LUKE: I have no further questions of Dr. Kiepfer.
THE COURT: All right.

REDIRECT EXAMINATION

BY MR. BLAGG:
Q. Dr. Kiepfer, I didn't know that you had testified in cases where Mr. Luke was the Prosecutor or Defender for the Government. Is that what you testified to?
A. Yes, I have.
Q. And you said how many times had you testified as a medical expert against the Government in cases?
A. I remember twice in Judge Prado's court, and I remember some other cases that came to deposition but did not come to trial.
Q. And Mr. Luke was the Government's attorney defending those cases?

A. Yes, he was.
Q. And are you aware of what the verdicts were in those cases?
A. I'm not aware of the amounts, but I'm aware that in both cases substantial verdicts were rendered for the Plaintiffs.
Q. All right. Mr. Luke was looking and going over with you your computer records, specifically for October 24th, 1991, and I believe specifically as to dilaudid. Do you recall him going over that with you?
A. Yes, I do.
Q. Do you have in front of you or will you please pull out your computer records for dilaudid? They're up there in Plaintiff's 13 or Defendant's 1, as well as Defendant's 2.
A. (Locating exhibits) Okay, starting on page eghteen, Defendant;'s 2.
Q. All right. He asked you a question, he wanted to know how much dilaudid you had on hand on October 24th of 1991, do you recall that?
A. Yes, I do.
Q. And your response was that there was 440 milliliters or 880 what?
A. Milligrams.
Q. Is that what your reponse was?
A. That is correct.
Q. Did you do that calculation by looking in at your computer records?